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CONSIDERATIONS MOVING FROM THIRD PERSONS.

IN most actions upon contracts, the consideration "moved" directly from the plaintiff to the defendant, either by way of a benefit conferred or a loss sustained, or both, and the promise sued upon was made by the defendant directly to the plaintiff.

But occasionally the whole consideration arises between the defendant and some third person other than the plaintiff, and the promise is made to such person alone; and the question arises, Can any other person than the promisee maintain an action upon such promise, solely because he is beneficially interested in its performance? Many cases seem to hold that he can. Is that a universal, or even a general rule? Is not the general rule the other way? If A. sends a present to B. by an express-man and pays him double price upon his promise to deliver the article promptly, can B. recover damages for the carrier's non-performance of that contract?

A perfect, well rounded contract requires not only a promise and a consideration, but a participation by each party in both of these elements. Possibly a privity as to only one might not always be fatal, though even this is doubtful; but a want of privity as to both the promise and the consideration certainly seems to be an insuperable obstacle to an action, upon the strict principles of the common law. If no other reason existed, the fact that the person who furnished the consideration, and to whom the promise was made, could always maintain an action upon it, seems to be a suffi-

cient reason why another person could not, even though interested in the performance. To allow two actions by two disconnected persons, having opposite interests, upon the same promise, would indeed be anomalous.[1]

That a plaintiff cannot maintain an action when the whole consideration moves from a third person to the defendant, and the defendant's promise is made wholly to such third person, has been the law of England for over two centuries.[2]

A marked illustration of this principle occurred in the recent case of Tweddle *v.* Atkinson,[3] in which two fathers, whose children had intermarried, promised each other to pay a certain sum to the son as a marriage portion. One of them failed to pay according to the agreement, and it was held that the son could not maintain an action for the amount, notwithstanding the relationship between the promisee and the son, and notwithstanding the contract itself stipulated that the son might do so.[4]

In America also the same general principle has been often adopted. This subject was carefully examined in Exchange Bank *v.* Rice,[5] where Mr. Justice Gray says, "The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter." In Edmundson *v.* Penny,[6] Gibson, C. J. says, "The plaintiff must unite in his person both the promise and the consideration of it, in order to recover."

A few illustrations of this rule may be given.

In Treat *v.* Stanton,[7] S. bequeathed $100 to each of five nieces, and appointed T. her executor. He placed the amount of the legacies in the hands of the defendant, who agreed with him to pay the nieces when they became of age, according to the terms of the will. It was held that the executor, and not the nieces, was the proper person to enforce that contract.

In Ross *v.* Milne,[8] the defendant, in consideration of a transfer

[1] See Corey *v.* Powers, 18 Vt. 589 (1846); Bank of the Republic *v.* Millard, 10 Wall. 156 (1869); Guthrie *v.* Kerr, 85 Pa. St. 303 (1877).

[2] Bourne *v.* Mason, 1 Ventris, 6 (1669); Crow *v.* Rogers, 1 Str. 592 (1724); Price *v.* Easton, 4 B. & Ad. 433; 1 N. & M. 303 (1833).

[3] 1 B. & S. 393 (1861).

[4] See also Byrne *v.* Byrne, 7 Ir. Jur. N. S. 221 (1862).

[5] 107 Mass. 41 (1871).

[6] 1 Pa. St. 335 (1845).

[7] 14 Conn. 445 (1841).

[8] 12 Leigh, 204 (1841).

of property to him by the mother of the plaintiff, agreed with her to pay the plaintiff £500 within two months after the mother's death; and it was held that the plaintiff could not recover upon that contract, as the consideration moved from another. In Cummings *v.* Klapp,[1] the plaintiff had an execution against one C. for $72.21, which he put into the hands of an officer for collection. The defendant, a friend of C., promised the officer to pay the debt in three months, in consideration of the officer's forbearance for that time to collect of C. Held, that the plaintiff, not being privy to the promise, nor consenting to the forbearance, could not maintain an action upon it. So if A. has a claim against B., and B., having a similar claim against C., obtains a promise from C., for a consideration paid him by B. to pay A.'s claim, A. cannot maintain an action against C. on that promise, being a stranger to the consideration and to the promise, and not having accepted C. as a debtor in lieu of B.[2] In McCoubray *v.* Thomson,[3] one G., owning a farm of the value of £196, wished to divide it equally between M. and T., and all three agreed that he might convey it to T., and T. promised to pay £98 to M. Held that M. could not maintain an action for the amount, although he was privy to the promise, simply because no consideration moved from him.[4]

So in Linneman *v.* Moross,[5] a father devised property to his son, who promised him, in consideration thereof, to pay the plaintiff, a daughter, $10 a month for life. Held, that she could not maintain an action at law upon such promise, and that, if it created a trust, it could not be enforced on the law side of the court.

In National Bank *v.* Grand Lodge,[6] the Masonic Hall Association issued its bonds to the amount of $200,000; some of which were held by the plaintiff. Subsequently, the defendant corporation voted to assume the payment of the bonds, provided the Masonic Hall Association would issue its stock to said Grand Lodge to the amount assumed as fast as the bonds were paid. Held, that the plaintiff could not recover on such promise, for want of privity, and Mr. Justice Strong thus states the rule on this subject:

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[1] 5 Watts & S. 511 (1843).

[2] Ramsdale *v.* Horton, 3 Pa. St. 330 (1846); and see Torrens *v.* Campbell, 74 Pa. St. 470 (1893).

[3] 2 Ir. Rep. C. L. 226 (1868).

[4] See also Faulkner *v.* Faulkner, 23 Ont. Rep. 252 (1893).

[5] 98 Mich. 178 (1893).

[6] 98 U. S. R. 123 (1878).

"We do not propose to enter at large upon the consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt, being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and the Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all, is enforceable by it."

So where the defendant had agreed to deliver certain goods to A., and A. gave him a written order to deliver the goods to B., and the defendant accepted the order and returned it to A., who gave it to B. as collateral security on a debt, it was held B. could not maintain an action against the defendant on the order and acceptance, for he furnished no consideration for it, and the contract was with A. and not with B.[1]

It is for the same reason, among others, that the payee and holder of a check on a bank cannot maintain an action on a promise made by the bank to the drawer of the check, to pay all

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[1] Rogers *v.* Union Stone Co., 130 Mass. 581; Morse *v.* Adams, Id. 585 (1881).

checks which he might draw on the bank, in consideration that he would deposit his funds in said bank, which had been done.[1]

So where in a policy of life insurance the company promises to pay the amount insured to the assured, his executors, administrators, or assigns, "for the benefit of his widow, if any," the widow cannot, at common law, maintain an action thereon in her own name,[2] especially if such policy be under seal.[3]

So a promise by a remaining partner to his retiring partner, upon a consideration between them, that he will individually pay all the firm debts, cannot in some courts be enforced against him individually by a firm creditor;[4] much less can such promise be enforced against one who was only a surety for the performance of such partner's promise, such surety receiving none of the assets.[5]

In Vermont too it is well settled that the general rule is that only the person to whom the promise is made, and from whom the consideration moves, can maintain an action at law upon it.[6] So in Michigan,[7] Minnesota,[8] and Indiana.[9]

Thus far there is *approximately* an accord in the different States on this subject. But there remains another class of cases where much difference of opinion exists. In the first place, it is quite generally agreed that if a debtor, without the knowledge of his creditor, conveys property to a third person, or, for some other consideration between them, procures a promise from such person to pay or guarantee the debt, the creditor cannot afterwards, upon learning of such promise, recover the debt from such third person, not having discharged the original debtor.[10] And logically that

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[1] Carr *v.* National Security Bank, 107 Mass. 45 (1871); Bank of the Republic *v.* Millard, 10 Wall. 152 (1869); Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82 (1871).

[2] Bailey *v.* N. E. Insurance Co., 114 Mass. 177 (1873); Chamberlain *v.* The N. H. Fire Ins. Co., 55 N. H. 249 (1875); Stowe *v.* Phinney, 78 Me. 244 (1886).

[3] Flynn *v.* North Am. Life Ins. Co., 115 Mass. 449 (1874).

[4] Merrill *v.* Green, 55 N. Y. 270 (1873); Morehead *v.* Wriston, 73 N. C. 398.

[5] Campbell *v.* Lacock, 40 Pa. St. 448 (1861); and see Morrison *v.* Beckey, 6 Watts, 349 (1837).

[6] Crampton *v.* Ballard, 10 Vt. 251; Pangborn *v.* Saxton, 11 Vt. 79; Hall *v.* Huntoon, 17 Vt. 244; Fugure *v.* Mutual Society, 46 Vt. 369; Fairchild *v.* N. E. Mut. Life Association, 51 Vt. 623.

[7] Wheeler *v.* Stewart, 94 Mich. 445; Hidden *v.* Chappel, 48 Mich. 527.

[8] Jefferson *v.* Asch, 53 Minn. 446.

[9] Salmon *v* Brown, 6 Blackf. 347; Farlow *v.* Kemp, 7 Id. 544; Britzell *v.* Fryberger, 2 Ind. 176; Conklin *v.* Smith, 7 Ind. 107.

[10] Owings *v.* Owings, 1 H. & G. 484 (1827); Butterfield *v.* Hartshorn, 7 N. H. 345, (1834); Blymire *v.* Boistle, 6 Watts, 182 (1837); Warren *v.* Batchelder, 15 N. H. 129 (1844); Finney *v.* Finney, 16 Pa. St. 380 (1851); Manny *v.* Frazier, 27 Mo. 419 (1858);

rule would apply, although the debt to the plaintiff be secured by mortgage of the debtor's real estate, and, in his subsequent conveyance of such estate to the defendant the latter assumes and promises to pay the mortgage debt to the plaintiff as a part of the consideration of the conveyance. Mellen *v.* Whipple,[1] is an important case in support of this position;[2] especially so in case of a promise by a second mortgagee to the mortgagor, which the first mortgagee seeks to enforce in an action at law in his own name.[3]

In such cases, as well as in cases of unsecured debts, the grantor of the equity has undoubtedly a right of action against the grantee, if he fail to pay the mortgage debt within a reasonable time after maturity;[4] in which action the grantor can recover damages to the full amount of the mortgage debt, if overdue, even if he has not yet paid it.[5] If the mortgagee himself also has a right of action against the grantee of the estate, the latter may be liable to two actions by different parties, acting independently of each other; and after having paid the debt in full to his grantor, who has retained the money, the grantee is still in danger of being called upon by the mortgagee to pay again to him.

Many cases, however, have enforced such contracts against the grantee in a suit by the mortgagee; but some of them were brought distinctly in equity; some were on the equity side of a court which combines both law and equity; some rest upon the assumed ground that the estate conveyed to the defendant and the retention of part of the purchase price by him makes him the holder of a trust fund to which the creditor can resort in law, even

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McLaren *v.* Hutchinson, 18 Cal. 80 (1861); Clapp *v.* Lawton, 31 Conn. 95 (1862); Robertson *v.* Reed, 47 Pa. St. 115 (1864); Pipp *v.* Reynolds, 20 Mich. 88 (1870); Turner *v.* McCarty, 22 Mich. 265 (1871); Halsted *v.* Francis, 31 Mich. 112 (1875); Wheat *v.* Rice, 97 N. Y. 296 (1884); Edwards *v.* Clement, 81 Mich. 513 (1890); Morrill *v.* Lane, 136 Mass. 93; Borden *v.* Boardman, 157 Mass. 410 (1892).

[1] 1 Gray, 317 (1854).

[2] And see also Prentice *v.* Brimhall, 123 Mass. 293 (1877); Crowell *v.* Hospital of St. Barnabas, 27 N. J. Eq. 650 (1876); Biddell *v.* Brizzolana, 64 Cal. 354 (1883); Page *v.* Becker, 31 Mo 466 (1862); U. S. Mortgage Co. *v.* Hill, Mass. Dist. Ct. (1879); Gurnsey *v.* Rogers, 47 N. Y. 233 (1872).

[3] Brown *v.* Stillman, 43 Minn. 126 (1890); Pardee *v.* Treat, 82 N. Y. 385 (1880); Clark *v.* Howard, 74 Hun, 229 (1893); Vrooman *v.* Turner, 60 N. Y. 280; Lorillard *v.* Clyde, 122 N. Y. 498 (1890); Durnhurr *v.* Rau, 135 N. Y. 219 (1892).

[4] Braman *v.* Dowse, 12 Cush. 227 (1853); Pike *v.* Brown, 7 Cush. 133 (1851).

[5] Locke *v.* Homer, 131 Mass. 93 (1881); Furnas *v.* Durgin, 119 Mass. 501 (1876), and cases cited on p. 507; Reed *v.* Paul, 131 Mass. 129 (1881); Williams *v.* Fowle, 132 Mass. 385 (1882).

without any promise; while still others consider that the mortgagor, when receiving the promise, acts as agent for the mortgagee, which act the latter may, and by bringing the action does, ratify and adopt. But none of them seem to deny the liability of the grantee to an action by his grantor to whom the promise is made, and from whom alone the consideration is received; and this view seems to leave the grantee liable to as many actions as there are creditors of the grantor whom he has agreed to pay. Some of the cases sustaining such actions are Burr. *v.* Beers;[1] Thompson *v.* Thompson;[2] Thorp *v.* Keokuk Coal Co.;[3] Merriman *v.* Moore;[4] Urquhart *v.* Brayton;[5] Miller *v.* Billingway;[6] Wood *v.* Moriarty;[7] Crawford *v.* Edwards;[8] Booth *v.* Conn. Mutual Life Ins. Co.[9]

There are several classes of cases, sometimes cited as supporting actions by a mere beneficiary, but which when carefully examined fall quite short of affirming such to be the general rule.

1. The first is where the consideration is advanced by and the promise is made to a third person, who is acting as agent or on behalf of the plaintiff, either known or not known to be such agent; for in such cases the consideration is in legal contemplation advanced by the plaintiff himself, and the promise is made to him.[10] Some early cases seem to have held that a near relationship between the promisee and the plaintiff, such as father and son, would sufficiently constitute an agency, so that the action might be maintained by the son upon a promise made to the father.[11] The modern view, however, is that such relationship does not, in and of itself, create an agency, and is at most only a circumstance tending to show an actual agency, and that something more must be shown than mere relationship to vary the rule applied in other cases.[12]

2. The second is where the plaintiff furnished some part of the consideration, and shared also in the promise; as where a debtor transfers all his property to a third person, who agrees with him and his creditors that he will pay the grantor's debts to them, and they assent to it, and discharge the original debtor; no doubt such creditors can recover of the promisor, for they part with a consider-

1 24 N. Y. 178.
2 4 Ohio St. 333.
3 48 N. Y. 253.
4 95. Pa. St. 78.
5 12 R. I. 169.
6 41 Ind. 489.
7 15 R. I. 578.
8 33 Mich. 385.
9 43 Mich. 299.

10 See Carnegie *v.* Waugh, 2 D. & R. 277 (1823); Hubbert *v.* Borden, 6 Whart. 79 (1840); Barry *v.* Page, 10 Gray, 398 (1858); Ford *v.* Williams, 21 How. 287 (1858).

11 Dutton *v.* Poole, 2 Lev. 210 (1677); Felton *v.* Dickinson, 10 Mass. 287 (1813).

12 Tweddle *v.* Atkinson, 1 B. & S. 396; Marston *v.* Bigelow, 150 Mass. 45; Wilbur *v.* Wilbur, 17 R. I. 295.

ation by discharging the original debtor, and are also participants in the promise. These cases are plain enough on the familiar doctrine of novation.[1]

3. The third, and by far the most numerous class, is where a debtor places money, or its equivalent, in the hands of a third person, upon his promise to pay the creditor; the creditor in such cases can recover the amount of such third person. This is familiar law everywhere.[2] But such recovery is usually by an action for money had and received to the plaintiff's use, — an equitable action, — sustainable, not *because* the defendant promised to pay to the plaintiff, but equally sustainable although he actually makes no such promise,[3] on the familiar ground that, wherever one has money in his hand which in equity and good conscience belongs to another, the latter may recover it in assumpsit for money had and received. This is so, even if the defendant refuses to pay it over on demand.[4]

That the action in such cases is not based upon the defendant's express promise to pay the plaintiff is apparent from the fact that if the defendant, for one and the same consideration, also promises to do some other thing for the plaintiff besides paying the debt, the plaintiff could not enforce such special promise in other respects. So also, if another person who does not himself receive the money, or other property, gives his guaranty to the debtor that the actual receiver shall deliver the money or pay the debt promptly, the creditor cannot maintain an action against such guarantor for failure to perform the promise.[5] The fact also that the creditor can recover only the amount so placed in the defendant's hands, and not necessarily his whole debt, although the defendant promised to pay the whole, shows that the action is not founded upon the special promise, but only upon the fact of assets received.

Many of the cases cited in support of the general right of a mere

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[1] Tatlock *v.* Harris, 3 T. R. 180; Heaton *v.* Angier, 7 N. H. 397; Wilson *v.* Copeland, 5 B. & C. 228.

[2] Lilly *v.* Hays, 5 Ad. & El. 548; 1 N. & P. 26 (1836); Crampton *v.* Ballard, 10 Vt. 251 (1838); Arnold *v.* Lyman, 17 Mass. 400 (1821); 9 M. &. W. 411; Carnegie *v.* Morrison, 2 Met. 402 (1841); Phelps *v.* Conant, 30 Vt. 277 (1858); Bank of Missouri *v.* Benoist, 10 Mo. 327 (1847); Putnam *v.* Field, 103 Mass. 556 (1870); Torrens *v.* Campbell, 76 Pa. St. 470 (1873); Barber *v.* Bucklin, 2 Denio, 45 (1846); Delaware & Hudson Canal Co. *v.* Westchester Co. Bank, 4 Denio, 97 (1847); Beers *v.* Robinson, 9 Pa. St. 29 (1848); Vincent *v.* Watson, 18 Pa. St. 96 (1851).

[3] Hall *v.* Marston, 17 Mass. 575.

[4] Frost *v.* Gage, 1 Allen, 262 (1861).

[5] See Campbell *v.* Lacock, 40 Pa. St. 448.

beneficiary to bring an action fall under one or the other of these three heads; some others are explainable on other grounds, while, on the other hand, a few are quite in conflict with the views herein expressed, and the authorities cited above.

One other consideration bearing upon this question. All agree that on sealed instruments and promissory notes a person not the payee cannot recover merely because it is expressed to be "for the benefit" of such person. But why any difference, so far as the right of action is concerned, between a promise under seal and one not? If the promisee is as distinctly and specifically named in the one case as in the other, is there any substantial reason for applying a different rule?

In view of the authorities upon this subject, can it be safely said, as it sometimes is, that *at common law*, "whenever one makes a promise to another for the benefit of a third person, the latter may maintain an action at law upon such promise"?

Edmund H. Bennett.

BOSTON, Nov. 1, 1895.